IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 253 OF 2006

Captain Lance Irwin Lobo,
Major, Businessman,
R/o Khobravaddo,
Calangute, Bardez-Goa. ... Applicant

versus

1. Mr. Ismail D'Souza
alias Angelo Ismail
de Souza, Major,
service, r/o Betim,
Bardez-Goa.

2. State of Goa,
through the Public
Prosecutor, Panaji,
Goa. .. Respondent

Mr. Nigel Costa Frias, Advocate for the Applicant.

Mr. S. G. Bhobe, Advocate for the Respondent No.1.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 24TH JANUARY, 2007.

ORAL JUDGMENT

Admit. By consent, heard forthwith.

2. Heard Mr. Nigel Costa Frias, the learned Counsel in support of the petition and Mr. S. G. Bhobe, the learned Counsel opposing the same.

3. This petition has been filed by one of the accused assailing the Order dated 31-3-2006 of the learned Additional Sessions Judge, Panaji, by which the learned Additional Sessions Judge partly allowed the revision application filed by the petitioner and refused to quash the Order of the learned J.M.F.C. issuing process against him, under Section 409 I.P.C.

4. To understand the controversy and to dispose of this petition, a few facts are required to be narrated. The applicant is the first accused and his daughter is the second accused in a complaint case filed by respondent no.1. The applicant and respondent no.1 shall be referred to hereinafter as accused and complainant, respectively.

5. The complainant is one of the five co-owners of a property named "Quinta" surveyed under survey No. 75/1 of Village Reis Magos. The complainant and the said co-owners by virtue of an agreement dated 19-10-1995 allowed Captain Lobo Constructions, a firm in which the accused is one of the partners to develop 5000 sq. meters of the eastern part of the said property. As per the said agreement and two addendums which followed, the accused was to pay a sum of Rs.50,00,000/- and in addition hand over the possession of a completed bungalow and cash of Rs.12,50,000/- in lieu of another bungalow, earlier agreed to be given. The bungalow has been completed and handed over to the complainant. In terms of the said agreement, the complainant and other co-owners were required to execute an irrevocable power of attorney in favour of the accused or his nominees with a view to sell the undivided share of the property in proportion to the bungalows to be constructed and sold by the accused and in fact the irrevocable power of attorney came to be executed by the complainant and other co-owners on or about 18-11-1995.

6. The complainant and other co-owners alleging that

the accused had misused the said power of attorney, by public notice dated 18-3-2000 revoked the same. The said notice was published on Navhind Times dated 18-3-2000. The accused by another public notice dated 10-9-2000 contested the said revocation stating that it was bad in law and he continued to be the Attorney of the Holders and yet by another notice dated 13-9-2000 the complainant and others maintained that the said power of attorney was revoked. Reliance has been placed on behalf of the complainant, on the decision of this Court in B. J. A. D'Souza reported in 2003(4) ALL MR 594, to contend that the power was revocable since the accused had no interest in the property. However, we need not go into that aspect.

7. The complainant on or about 30-8-2001 filed Special Civil Suit No.78/2001/C for specific performance of the said agreement and for liquidated damages and also filed an application for temporary injunction which came to be dismissed by Order dated 1-6-2002. In the said Order, the learned Civil Judge, Senior Division, observed that the complainant and others/plaintiffs had received substantial amount towards the consideration of the agreement and had also taken the

possession of the bungalow. The learned Civil Judge also observed that the said plaintiffs had suppressed the fact that they had taken possession of the bungalow and had pleaded that the accused/defendants had failed to deliver the possession of the bungalow. In fact, as per the accused all that the accused is required to pay to the complainant and others is a sum of Rs.8,00,000/- but according to the complainant it is Rs.18.50,000/- which they have to receive from the accused.

8. The complainant has categorically stated in the complaint that the accused had undertaken the development and sold undivided share in the property to different purchasers and there is no dispute that by Sale Deed dated 12-6-2002 the complainant and others sold in favour of complainant's witness the said Abhijit Almeida a completed bungalow along with undivided 300/5000 part of the said property, the subject matter of the said agreement. Admittedly, this was done by the accused after the power of attorney was revoked and till date the complainant has raised no grievance that the accused could not have sold the said undivided part in favour of his own witness the said Almeida inspite of the revocation of the power of

attorney in the same manner that the complainant has made a grievance that the accused could not have sold what he sold to his daughter/accused no. 2 by Sale Deed dated 19-5-2003. A reading of the said sale Deed dated 19-5-2003 shows that what was conveyed by the accused as attorney of the complainant and others was 1979/5000 part of the said property comprising of plots A on which Villa A stands, plot C on which Villa C stands, plot E on which Villa E stands, plot G on which Villa G stands and plot H on which Villa H stands each plot admeasuring 300 sq. meters(plot E admeasuring 500 sq. meters) together with 189 sq. meters of undivided area ... etc. Complainant's witness was examined to say that there were no villas, as stated in the sale deed.

9. The complaint came to be filed on 25-11-2004 and after the complainant was examined on oath and the statement of his said witness was recorded, the learned J.M.F.C. was pleased to issue process against the accused under Sections 409, 418, 423, 465, 468 and 471 r/w Section 120-B I.P.C. against both the accused, even though the sale deed dated 19-5-2003 was not executed by the daughter/A2 and was executed only by

the accused. No process was issued against the accused under Section 468 I.P.C. The accused challenged the said Order before the Court of Sessions and the learned Additional Sessions Judge by the impugned Order dated 31-3-2006 came to the conclusion that the learned trial Judge had erred in applying Section 120-B I.P.C. and there was no prima facie evidence of issuance of process under Sections 418, 423, 465, 468, 471 and 120-B I.P.C. As far as Section 409 I.P.C. is concerned, the learned Additional Sessions Judge observed that the accused had committed criminal breach of trust in the capacity as attorney or agent of the complainant and other co-owners of the property by conveying the divided area of all the plots around the Villas in favour of his daughter, the accused no.2.

10. It is this Order which is in challenge in this petition.

11. On behalf of the accused, it is contended by the learned Counsel, that it was clear from the schedule of the sale deed that what was conveyed by the accused, as attorney of the complainant and others, to the daughter/A2 was undivided 1979/5000 part comprising of the plots on which the villas

purchased by her were constructed and the finding of the revisional Court therefore that the accused had conveyed to his daughter, the accused no.2, the divided are of all the plots around all the villas as well as the total undivided area mentioned therein, is erroneous. It is further contended that it was the specific case of the complainant that the power of attorney executed by them in favour of the accused was revoked by them and therefore it did not stand to reason that the accused could have committed the offence of criminal breach of trust in his capacity of attorney of the complainant and other persons. In other words, if the power was terminated the accused could not be the agent. As per the accused, in order to make out a case under Section 409 I.P.C. the complainant had to show that at the relevant time the accused was acting as an agent or attorney of the complainant in the transaction in question i.e. Sale Deed dated 19-5-2003 executed by the accused, in favour of his daughter, the accused no.2, and the accused was entrusted with or had domain over the property which was the subject matter of the transaction. It is contended that after revocation of the power of attorney by public notice dated 18-3-2000, the accused had ceased to act on behalf of the complainant and other co-

owners and had no authorization from the owners to act on their behalf and/or to deal in any manner with regards to the said property after 18-3-2000 and therefore there was no entrustment to the accused of the said property.

12. On the other hand, it is contended on behalf of the complainant that in terms of the agreement dated 19-10-1995 the property was entrusted to the accused for development and the works to be carried out were specified in Clause 3 of the said agreement. On behalf of the complainant, it is contended that the accused could not have executed any of the Sale Deeds or sale of the property unless the owners were paid in full and that despite having no authority to execute the Sale Deeds, the accused no.1 executed the Sale Deeds in respect of the property belonging to the owners and as such has committed criminal breach of trust.

13. Section 405 I.P.C. defines criminal breach of trust and Section 406 I.P.C, for which no process was issued, provides punishment for it. Section 409 I.P.C. deals with criminal breach of trust by public servant, or by banker, merchant or agent. It

provides that whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

14. Needless to observe the first ingredient which was required to be proved by the complainant whether in relation to Section 406 I.P.C. or Section 409 I.P.C. is entrustment. On behalf of the complainant, Clause 3 of the agreement dated 19-10-1995 is being pointed out to show that there was entrustment of the property in this case. The said Clause 3, inter alia, states that "on payment of the above mentioned amount of Rs.50,00,000/-(Rupees Fifty Lakhs only) the owners shall entrust the eastern part of the property admeasuring approximately 5000 sq. meters shown in the blue outline in the plan annexed hereto to the Developer for the development of the said plot ...". However, there is no other Clause in the said

agreement which specifically states that by virtue of execution of the said agreement the property was actually entrusted to the accused. Entrustment is not a term of law or of art. It is an ordinary word connoting that property was handed over to another in whom confidence was reposed for a specific purpose. In entrustment the possession of the property is transferred to another and the person who transfers possession of the property to the other party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party. In the case at hand, Clause 20 of the agreement dated 19-10-1995 categorically and unequivocally states that the owners i.e. the complainant and others would be deemed to be in possession of the said plot until they had received the total consideration under this agreement in cash as well as in kind. In other words, the said Clause 20 is an indication that the possession of the property had remained with the complainant and others and it was not entrusted to either the firm or the accused. If possession of the property continued with the complainant and others, it only means there was no entrustment and the accused was only allowed to develop

the property which was in the possession of the complainant and others. Therefore the basic ingredient of Section 409 was not complied with and therefore there was no question of the accused having committed an offence under Section 409 I.P.C. This is one aspect of the matter. The other aspect of the matter is that no criminal breach of trust under Section 409 I.P.C. could have been committed by the accused after his agency was terminated.

15. After the complaint was filed, the complainant was examined upon oath. All that the complainant stated in his examination on oath was that they had given power of attorney to A-1 for developing their property and the said power of attorney was revoked by publishing notice in the newspaper and after revoking the said power of attorney A-1 used the same for selling bungalows and accused no.1 also sold a bungalow and part of land to his daughter which is undivided and A-1 also executed the Sale Deed in favour of his daughter.

16. I have already observed that the accused after revocation of the power of attorney had also executed a Sale

Deed of a bungalow along with undivided right to the property in favour of the complainant's witness Shri Almeida against whom the complainant till date has made no grievance. All that the complainant stated in his examination-in-chief is that the complainant did something which he could not have done by virtue of revocation of the power of attorney. The facts stated by the complainant and reproduced hereinabove, in my view, did not disclose any offence for the accused to be summoned. A conjoint reading of Sections 203/204 Cr.P.C. shows that process is to be issued after considering the statement on oath of the complainant and of the witnesses and the result of the inquiry or investigation, if any, under Section 202. The recording of the statement on oath of the complainant under Section 200 Cr.P.C. is not an empty formality. Commonly it is nicknamed as verification. To verify means to establish the truth. In other words, verification is done in order to ascertain as to what is pleaded by the complainant is true or not. It is with a view to separate chaff from the grain as many a times complaints do contain unfounded allegations and it is the duty of the Court to ensure that what is stated in the complaint is also stated by the complainant on oath and it is only then that based on such

statement that process can be issued. The corollary of this would be that unless offences are disclosed from the statement on oath, no process can be issued only based on averments in the complaint. The complainant is bound to make a statement on oath as to how the offence was committed and how the accused persons are responsible therefor. After the statement on oath is recorded, a Magistrate is required to apply his judicial mind to the facts of the case and the law applicable thereto and find out what offence/s is made out, notwithstanding that the other party at that stage is unrepresented. As observed by the Apex Court time and again, summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course. A Magistrate is required to examine the nature of the allegations made in the complaint and the evidence both oral and documentary to see if it is sufficient for the complainant to succeed in bringing charge home to the accused. In other words, the examination of the complainant on oath is for the purpose of ascertaining whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. As observed

by the Apex Court in **Punjab National Bank and others** v. **Surendra Prasad Sinha**(1993 Supp. (1) SCC 499), it is salutary to note that judicial process should not be an instrument of oppression or needless harassment. A Magistrate is required to find out whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued and at that stage the Court has got to be circumspect in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of Majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance.

17. The Apex Court in **Madhvrao Jiwajirao Scindia and others** v. **S. C. Angre**(1996 (1) SCC 692) observed that the legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court

is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose.

18. In **S. N. Palanitkar and others** v. **State of Bihar and another**(AIR 2001 SC 2960) the Apex Court observed that when there was nothing either in the complaint and/or in the sworn statements of the complainant and witnesses that any property was entrusted to any of the accused at all or the accused had domain over any of the properties of the complainant which they dishonestly converted to their own use it could not be said that the accused committed offence under Section 405 I.P.C.

19. In the case at hand, the complainant and others filed a Civil Suit on or about 30-8-2001 against the accused and failed to obtain an injunction Order on 1-6-2002. The accused sold bungalow with undivided right after the power was revoked on or about 12-6-2002 in favour of the complainant's witness the

said Almeida and the complainant and others have made no grievance against him. The complaint came to be filed almost two years later, after the filing of the Civil Suit and the complainant did not at all translate the averments in the complaint in his statement on oath, the substance of which I have already reproduced. In such a situation, no process at all could have been issued against the accused.

20. In view of the above, the petition deserves to succeed and the order of the learned Additional Sessions Judge to the extent that the process issued against the accused under Section 409 is upheld deserves to be set aside. Consequently, complaint against the accused(i.e. A-1) shall stand dismissed.

N. A. BRITTO, J.

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